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International Human Rights Norms
and their Incorporation:
The Protection of Aliens in Europe

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**International Human Rights Norms
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Policies towards non-nationals stand at the crossroads between the principle of national sovereignty whereby states can decide who enters and exits their territory and human rights norms that constrain the actions of states in liberal states.¹ As Leah Haus has pointed out, "migration is relevant for those interested in exploring possible transformations in state sovereignty."² Recent academic work on the rights of foreigners in Europe has emphasized the existence of a post-national discourse on membership in Europe that operates at the transnational level and challenges national policy efforts to control migration flows and curtail migrant rights.³

What is the impact of norms enacted by international organizations on the rights of foreigners in contemporary Western Europe? In this article, I trace the process of incorporation of European Court of Human Rights and European Court of justice legal norms in the jurisprudence and policies regarding aliens in France, Germany, and the Netherlands in the postwar period. Resident aliens in European receiving countries have seen their legal status improve since the 1970s, in spite of the restrictive goals of migration policy after the first oil shock and an adverse political climate brought about by socioeconomic restructuring and the rise of anti-immigrant parties. Foreigners were allowed to bring in their families, they enjoy a more secure residence status, and better guarantees against expulsion. Moreover, they have gained access to civil, political, and social rights that had been previously reserved for nationals.⁴ When trying to account for the betterment of the status of non-nationals, there is at least one reason to seek an explanation at the international or European level: albeit in varying degrees and at different speeds, similar changes in foreigners' rights occurred across European states regardless of their respective immigration histories, traditions of incorporation, or nationality laws,⁵ thereby suggesting that a supra-national dynamic was at work.

¹ Habermas 1994.

² Haus 1995, 285.

³ See in particular Soysal 1993, 1994, 1997; Sassen 1996; Jacobson 1996. They concur to some extent with scholars who call for the development of a substantive European citizenship that would be distinct from citizenship in one of the member states of the European Union. For current debates on European citizenship, and issues of participation, see, for instance Wiener 1997. For an assessment of these debates, see Weiler 1996b and Favell 1997b.

⁴ For a description of these changes, see Brubaker 1989; Layton-Henry 1990; Hammar 1990; Soysal 1994; Freeman 1995; Guiraudon 1997, 1998a.

⁵ For cross-national studies on immigration, citizenship, and migrant incorporation policies in Europe, see Hammar 1985; Brubaker 1992; Soysal 1994; Ireland: 1994, Hollifield: 1992; Favell 1997a; Baldwin-Edwards and Schain 1994; Costa-Lascoux and Weil 1992, Lapeyronnie: 1992.

I examine a number of norms at the supranational level likely to have weighed on domestic improvements of the status of foreigners. Each time, I ask the following queries: How far do they go in affirming the rights of non-nationals? Did they motivate national policy decisions or jurisprudence? If so, when, in which countries, and through which mechanisms? The answers are based on the analysis of international legal texts, national and European court records, as well as on interviews with judges, policymakers, human rights and pro-migrant activists and the scanning of immigration debates and official documents for references to international standards.

I call the norms analyzed here “international” and distinguish them from national ones for two main reasons. First, the European Convention of Human Rights was adopted in 1950 in particular circumstances: the beginning of the Cold War when the United States used its status as a hegemon in the West to pressure Western European nations into developing instruments to bolster democratic and liberal values. Moreover, the Convention’s draft was finalized by a multinational committee of experts. It is interpreted by an independent group of judges from the different signatory states in such a way that neither the Convention nor its jurisprudence can be said to equate with a particular national bill of rights or legal vision. Furthermore, I examine specifically the norms that emerge through the decisions of a multinational college of judges on the (equal) treatment of aliens. They are parallel to the development of national jurisprudence and laws but the latter cannot be said to causally affect the former nor can the jurisprudence be said to be dominated by one particular national legal culture.⁶

The framework and findings presented in this article seek to contribute to three debates in international relations theory. The first debate regards international/domestic linkages and is relevant to our understanding on the current state of state sovereignty.⁷ The second academic discussion regards the capacity of international organizations to affect domestic policy outcomes. The now vast literature on international organizations has mainly sought to understand why states (principals) delegate authority to international organizations (agents). By studying the ways in which Council of Europe and European Union courts try to bear on the policies of signatory states, I ask whether there is a fit or a gap between state interests and the influence of the courts.

The third one concerns the ways in which we can measure the unmediated effect of international norms on the policies of nation-states and, if so, how?

⁶ On the history of the creation of the Council of Europe, the European Convention and European Court of Human Rights, see Bitsch 1997.

⁷ Krasner 1993; Wendt 1992.

Scholarly interest in norms understood as collective understandings of appropriate behavior re-emerged in the late 1980s as a legitimate competitor to interest-based, or power-based explanations in international relations⁸ at the same time as historical institutionalists in comparative politics were exploring anew the role of ideas and paradigm shifts to explain policy variations.⁹ There is still room for debate as to “which norms matter”¹⁰ and under what conditions. As Albert Yee recently underlined, analysts of the effects of ideas on policies have not responded convincingly to scholars who deny their existence because they do not specify policy resultants precisely, do not differentiate between various types of ideas and beliefs and, more importantly, need to establish clearly the causal link between the two.¹¹ The elaboration of testable hypotheses on the independent role of norms calls for a clear specification of the micromechanisms whereby norms emerge, are diffused, and transform existing practices.

Before laying out the research design chosen for this study, I discuss ways of conceptualizing the principled beliefs that are likely to influence policies towards aliens and I review the debate on the import of international normative constraints within the field of immigration and citizenship studies. In the first part of the article, I examine the jurisprudence of European Court of Human Rights on aliens’ rights and its national cooptation. In the second part, I discuss another possible international source of norms diffusion, namely the European Court of Justice. Finally, I examine one possible explanation for the limited impact of human rights norms on aliens’ rights, namely the deficiencies of a transnational issue network (involving European Union and subnational level actors and other countries such as neighbouring states or sending countries of immigration). The general findings of the empirical research presented here are that (a) a well-established norms protecting aliens does not exist in Europe, (b) the international jurisprudence that has developed in limited areas has been incorporated varyingly by different countries and (c) domestic constitutions provide stronger tools to protect the rights of non-nationals than international conventions.

⁸ In particular, see Axelrod and Keohane 1986, 229; Jervis 1988, 317-319; Goldstein and Keohane 1993; Katzenstein 1996; Lumsdaine 1993; Mc Elroy 1992; Klotz 1995; Tomson 1994; Goertz and Diehl 1992; Sikkink 1993a, 1993b; Finnemore 1993, 1996; Legro 1997.

⁹ Hall 1989.

¹⁰ Legro 1997.

¹¹ Yee 1996, 69-70.

Global norms: theoretical insights from sociology and their limitations

In the discussion on the role of norms, some international relations theorists have engaged in a debate with organizational sociologists and drawn from their concept of institutionalized norm. The sociology literature is particularly relevant to the discussion of aliens' rights since one of the major comparative studies on the issue has been written by Yasemin Soysal, an institutionalist and a sociologist.¹² For sociologists like John Meyer, norms and rules are not structures of incentives and constraints which determine the calculus of actors but rather function as templates for behavior as in the case of routines, standards of appropriateness, cultural symbols and cognitive schema.¹³ The latter enable actors to find solutions to their problems by providing cues and scripts as to what constitutes legitimate forms of action.¹⁴ Strategies of action emerge from a process whereby shared models of appropriate action are constructed socially and diffused through the organizational environment.¹⁵ This theory sparked interest in political science as a means of challenging approaches that conceive of political decisions as driven by the cost-benefit calculus of self-interested actors.¹⁶

The theoretical underpinnings of the Stanford-based school speak directly to international relations theory. Organizational sociologists contend that external cultural legitimacy rather than functional needs explains most organizational behavior. This external culture spreading around the globe is, in fact, Western culture, and Western-type rationality. Among the artefacts that it has created: the organization of the world into bureaucratic states who value individualism and expanding notions of individual rights.¹⁷ John Boli's work shows, for example, that citizenship rights have evolved in a coordinated way over the last century so that the pattern of rights expansion (e.g. when women voted or welfare rights were codified) in a particular state does not correlate with local conditions but with the international cultural norms about rights at the time the constitution was written.¹⁸

The research generated has taken the form of event history analyses, and quantitative studies that include many states across time and look for signs of

¹² Soysal 1994. See the next section for further discussion of her argument.

¹³ See Thomas et al. 1987. For a review of new institutionalisms, including organizational sociology, see Hall and Taylor 1994.

¹⁴ Powell 1990.

¹⁵ Scott and Meyer 1994.

¹⁶ Finnemore 1996; Katzenstein 1996.

¹⁷ Meyer 1980, 1987; Strang 1991.

¹⁸ Boli 1987.

isomorphism. This type of research agenda and methodology has certain limitations. First, "detailed process-tracing and case study analyses to validate and elaborate the inferences based on correlation are missing."¹⁹ Second, it first underestimated cross-national variation although more recent studies seem to take it into account.²⁰ Recent studies on the propagation of transnational ideas have all highlighted the ways in which national structures influence their domestic infiltration to create significantly different outcomes.²¹ Kathryn Sikkink's study on human rights policy in Europe and the US has demonstrated that, in spite of a similar international normative commitment, the time at which human rights became important and the nature of the policies which they generated were very different.²² Even when there is a shift in international discourse, national variations in its adoption abound partly because of resistance and conflict that organizational sociologists do not dwell on. In this paper, I seek to pay particular attention to these two missing elements: process-tracing and cross-national differences in norms adoption.

In order to do so, it is fruitful to study a "critical case" as is the case of post-war Europe. The post-war period saw the multiplication of international human rights declarations such as the 1948 UN Universal Declaration of Human Rights under the auspices of the United Nations. Yet, as Kathryn Sikkink reminds us, only in Europe were steps quickly taken to "translate the human rights ideals of the declarations (...) into widely shared understandings and practices."²³ In particular, as part of democratic reconstruction and European integration, an unprecedented system of monitoring and enforcement of human rights norms was set up. The 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms came into force in 1953 and the European Court of Human Rights -the first international jurisdiction of human rights protection in history whose decisions are binding on signatory states- started functioning in 1959. Between 1959 and 1993 (inclusive), the Court ruled on 447 cases and this number is rapidly growing. In fact, the number of appeals has risen so dramatically (there were 5000 cases registered in 1989 for example) and the length of procedures become so long (five years) that a reform of the system was decided at the Vienna summit in 1993.²⁴ The European Community, especially after the 1960s, also vowed to

¹⁹ Finnemore 1996, 339.

²⁰ Boli, Meyer, Ramirez and Thomas 1997.

²¹ Hall 1989.

²² Sikkink 1993b.

²³ Sikkink 1993a, 414.

²⁴ See Flauss 1997.

guarantee fundamental rights.²⁵ And states also ratified a number of International Labor Office conventions to protect the rights of workers, including foreign ones. Europe is subsequently, the “most likely” case for the impact of norms to be observed.²⁶

The protection of strangers should constitute an important test for human rights since they do not claim protection as members of a family, clan, or nation but as members of humanity. Writing about Europe in the 1930s, Hanna Arendt pointed out that refugees found out cruelly that “loss of national rights was identical to loss of human rights, that the former inevitably entailed the latter” (1979, p. 292). Does her statement still hold true? If not, can we attribute this change to the successful incorporation of post-war international human rights norms into domestic polities? One could consider that international human rights norms should take great care in asserting the rights of aliens since they cannot avail themselves of the rights reserved for citizens such as rights of political participation and, in this respect, are more likely to see their rights usurped. Moreover, since immigration is an international phenomenon by nature, international rules designed to regulate the status of migrants should abound. Notwithstanding, immigration is a very sensitive issue politically, the ability to choose who to include within the polity is one of the founding prerogatives of nation-states and migration control is a stated policy goal in Europe since the 1970s so resistance from national governments is to be expected in this area.²⁷ One can therefore legitimately wonder to what extent the European human rights regime includes non-nationals within its realm of protection and what incidence it has had on foreigners' rights at the national level.

²⁵ When the European Court of Justice (ECJ) established supremacy and direct effect of Community law, German and Italian constitutional courts declared that they would not recognize Community law whenever the latter was incompatible with domestic constitutional protection of individual freedoms. The ECJ fearing for its autonomy and challenged in its authority responded by recognizing as a source constitutional principles common to the member states. It is now explicitly stated in Article F of the Treaty on European Union. See Currie 1994 and Alter 1996.

²⁶ On this methodology, see Eckstein 1975; King, Keohane, and Verba 1994. For a study on the impact of international norms using a “least likely” case study, see Legro 1997.

²⁷ In this respect, it should be clear that, the protection of aliens, as a policy area, is not a most likely case for the effect of international norms *a priori*. Notwithstanding, Europe is the most likely region where their human rights should be respected.

The state of the debate in the immigration and citizenship literature

In *Limits of Citizenship*, Yasemin Soysal states that the post-war elaboration of an international human rights discourse has functioned as a powerful norm guiding behavior at the domestic level. In her view, “international governmental and non-governmental organizations, legal institutions, networks of experts, and scientific communities (...) by advising national governments, enforcing legal categories, crafting models and standards, and producing reports and recommendations, promote and diffuse ideas and norms about universal human rights.”²⁸ She points to the creation of a number of international charters providing nation-states with guidelines for the treatment of non-citizen populations on their territory. She argues that the transnational development and diffusion of a legitimizing discourse based on universal human rights explains why foreigners acquired more rights in a number of European countries even after they were no longer needed as workers. She correlates the emergence of human rights arguments and the new conception of state membership that came with it with the evolution of foreigners' rights. The causal mechanisms whereby one leads to another remain unclear from the examples that she provides.²⁹ A more systematic research design is thus necessary to assess both parts of her hypothesis if we are to ascertain that national actors adopt transnational norms that affect policy outcomes. For, as Soysal herself underlines, it is still up to nation-states to abide by international norms.³⁰ Gérard Noiriel's study on the right of asylum underlines that international texts are applied by state administrations and courts who do so according to their own national values and with their own notion of the national interest in mind.³¹ Jeff Chekel's work on international norms and citizenship debates in post-cold-war Europe has also emphasized that the incorporation of norms vary according to a country's state-societal relationship.³²

Other recent works have gone even further than Yasemin Soysal in pointing to international constraints on the capacity of nation-states to control migration. Saskia Sassen in a book revealingly entitled *Losing Control?*, points to the external economic and human rights constraints on restrictive control policies that render them mostly symbolic. They constitute a way for national governments to appear to control transnational phenomena such as migration while they no longer can effectively.³³ She further predicts that the coexistence

²⁸ Soysal 1994, 152.

²⁹ Soysal 1994, 143-156.

³⁰ Soysal 1994, 143.

³¹ Noiriel 1991.

³² Chekel 1995.

³³ Sassen 1996.

between an open regime for capital and a closed one for labor is too unstable to last. *Controlling immigration*, a volume edited by Wayne Cornelius, Philip Martin, and Jim Hollifield, also highlights the gap that exists between the stated restrictive goals of migration control policy in advanced liberal democracies and the results achieved.³⁴ National agencies have not been able to prevent unsolicited flows of family members, and asylum-seekers to come and stay nor can they expel undocumented aliens as they please. David Jacobson in *Rights across borders* makes the strongest claim about the causal link between the failure of the state to control migration and the rise of an international human rights regime. In his view, "the basis of state legitimacy is shifting from principles of sovereignty and national self-determination to international human rights."³⁵

These claims have not gone unchallenged. Some scholars have pointed out that, although one cannot deny that normative constraints have limited the ability of migration control agencies to stem unsolicited migration flows, the latter have stemmed from domestic constitutions and activist judiciaries. Jim Hollifield has argued that it was the liberal norms of democratic European states that explains why, after the mid-1970s, foreign workers stayed and their families came to join them. Political science and legal studies on policies towards asylum-seekers and family reunification conducted by Christian Joppke, Gerald Neuman, and John Guendelsberger further show that aliens secured rights in countries such as Germany and France through activist national judiciaries basing their jurisprudence on national constitutional norms rather than international human rights standards.³⁶ The same phenomenon has also been observed in the United States.³⁷

Another line of analysis has focused on the claim that states are indeed losing control over migration policy whether because of national or international constraints. Gary Freeman³⁸ and Gallya Lahav³⁹ have described how, in the recent period, national agencies have devised new means of preventing migration, raised budgets for control agencies, multiplied and diversified controls and shown that the number of entries does not suggest a massive "migration crisis" in advanced liberal democracies. Researchers focusing on new intergovernmental cooperation on immigration and asylum issues present yet a more sceptical view of the impact of human rights norms.

³⁴ Cornelius, Martin, and Hollifield 1994.

³⁵ Jacobson 1996, 2.

³⁶ Joppke 1997, 1998; Neuman 1990; Guendelsberger 1988.

³⁷ Schuck 1984, 1992.

³⁸ Freeman 1994.

³⁹ Lahav 1997. See also Brubaker 1994.

International agreements such as Schengen have increased the coordination of police and border officials from different countries while diminishing their accountability in ways that render migration control more rather than less efficient.⁴⁰ In many ways, the polemic within the field of international migration re-enacts theoretical debates in IR. Some emphasize the causal impact of international institutions, others affirm the preeminence of domestic factors, and yet another group see international cooperation as strictly maximizing state capacities to meet their national policy goals. The research design outlined in the next section aims at testing the empirical robustness of these diverging views.

Testing the impact of norms in comparative perspective

The dependent variable in this study consists in changes in the rights of foreigners (legislative, regulatory, or jurisprudential) since 1973 when European governments declared an official stop to foreign labor recruitment and developed restrictive control policies. The countries chosen for study are France, Germany, and the Netherlands. These three countries all belong to the same web of international organizations and have signed the same international covenants and treaties. They should therefore be exposed to the same international normative pressures. When process-tracing the impact of norms, I will focus on the dispersion in the way they interpret and incorporate similar international norms.

These countries have comparable numbers of foreigners on their soil.⁴¹ Other factors are also controlled for, namely economic ones. The available economics literature regarding the impact of migration on the income of natives, employment, or GDP is still relatively inconclusive or has found little or no impact and, in any case, has not shown that there were significant differences among countries.⁴² In any case, the three countries have similar stated (restrictive) migration control goals since the oil shock. This means that I am controlling for “state interests” as realists would consider these policy goals.

⁴⁰ Bigo 1992, 1996. Guiraudon and Lahav 1997.

⁴¹ See SOPEMI 1992. In 1990, there were 4.6% of foreigners in the Netherlands, 6.4% in France, 8.2% in Germany. They are many less in Great Britain (a special case because of its lack of constitution) and Scandinavia and many more in countries like Luxemburg and Switzerland (the latter is not part of the same international institutions in any case). I sought to have the smallest variation between the three cases possible with respect to the size of the foreign and immigrant population.

⁴² Economic studies of the impact of migration include Altonji and Card 1989; Ortega 1996; Schulze 1996; Bröck 1996.

The mechanisms whereby norms that transcend the national level can result in domestic changes in aliens' rights fall into different categories. I focus here on international norms that can have a national impact through legally binding agreements. They are more observable and their effect is more traceable than non-legal norms. They are also more likely to have an effect because of their very degree of institutionalization. They include human rights norms such as those of the European Convention of Human Rights and norms based on other principles (e. g. freedom of trade and services) as they might be found in the Treaty of Rome. The main empirical focus here is on the European courts that have monitoring and enforcement powers (the European Court of Human Rights and the European Court of Justice).

Next, I study the intervening variables that account for cross-national variance in the incorporation of European legal norms. The phases that separate the adoption of an international text and its appearance in national regulations and laws are numerous. So are the conditions necessary for international norms to result in a domestic praxis. Even once international jurisprudence on an area has emerged, national factors need to be taken into account to understand whether the latter will be incorporated by national legal systems. These factors include 1) national rules of legal incorporation 2) the existence of national legal cultures favorable to international law and to human rights argumentations, 3) the mobilization of knowledgeable subnational actors, and 4) the congruence of international and national norms.

Finally, I consider the role of supranational actors such as the European Parliament, and the European Commission, Brussels-based NGOs and consultative initiatives such as the Forum of Migrants, along with subnational actors who refer to international declarations as a basis for the legitimacy of their claims. The question is whether a transnational issue network that could help diffuse international norms has emerged. The latter could also include neighbouring countries and sending countries that seek to exert pressure to influence domestic decisions regarding the rights of foreigners.

I. The marginal effect of international legal human rights norms

What norms have emerged from the international human rights law? What are the conditions necessary for the incorporation of norms in national contexts and for their impact on policy? Answering these questions requires the analysis of international human rights legal norms and the ways in which they speak to issues affecting the rights of foreigners –especially insofar as signatories are meant to protect the fundamental freedoms of people within their jurisdiction regardless of nationality. It also entails a systematic comparative study of the incorporation of these norms nationally -by courts but also by political actors and policy-makers.

1. The European Court of Human Rights and foreigners: Legal basis and jurisprudence

The notion that human rights instruments protect people regardless of the passport that they hold is the first one that needs to be tested here. In order to ascertain that the principle of non-discrimination on the basis of nationality is an important international norm, we need to study the text themselves. In fact, postwar conventions setting human rights standards in Western Europe put a number of hindrances to their universal application. Political rights are explicitly reserved for citizens (Article 16 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Article 25 of the 1966 International Covenant on Civil and Political Rights). Compared to the citizenship paradigm, the human rights one is more limited as it overlooks civic rights and political participation of non-nationals.⁴³ As the minutes of international courts never fail to reiterate, the leitmotiv in human rights covenants is that the principle of national sovereignty of the contracting parties is not to be challenged. The state can decide who enters, who participates in the "general will", who can become part of the nation and naturalize. The same remark applies to conventions which focus on socioeconomic rights in so far as the latter justify laws aiming at the protection of the national labor market (except for the European Union treaties). The 1966 International Convention on the Elimination of all Forms of Racial Discrimination also specifically mentions that discriminations on the basis of nationality do not apply (Article 1, § 2). Furthermore, a number of treaties undermine the universal character of human rights by restricting the enjoyment of rights to specific nationalities based on the principle of reciprocity. Such is the case of the 1977 European Convention on the Legal Status of Migrant Workers or the European Social Charter.

⁴³ For an interesting discussion of the relationship between citizenship and human rights discourses in relation to migration issues, see Bauböck 1995.

Another substantive characteristic of international conventions is that the nation-state is designated as responsible for organizing state membership and implementing human rights principles. Before they do, a number of procedural loopholes allows them to avoid such implementation. First, international agreements do not all have a legal value. It sometimes takes decades before they are ratified and states can do so only partially and/or fail to ratify controversial protocols. Individual petition to an international court is not always possible. Moreover, states use "reserves" or "interpretative declarations" when adhering to international conventions so that "a large part of the system of protection [of rights] is excluded in a way which is antinomical with the idea of a minimum standard of protection embedded in those texts."⁴⁴ One such example regards the "declarations and reservations" that France published after it adhered to the International Covenant on Economic, Social, and Cultural Rights in 1980. It stated that the articles of the Pact which proclaimed a universal right to work and welfare "should not be interpreted as obstacles to enacting regulations foreigners' access to the labor market or establishing residence criteria for the allocation of certain welfare benefits."⁴⁵ The Dutch Parliament, when considering the European Social Charter in 1978, also entered a reservation so that the lack of adequate means of subsistence could remain a ground for expulsion in spite of the charter.⁴⁶

What about the jurisprudence of human rights courts, in particular the record of the European Court of Human Rights (the ECHR)? From 1959 when the Court started functioning until December 1993, less than a dozen decisions have involved the civil rights of foreigners (2.5% of the decisions).⁴⁷ The decisions were all issued during the last ten years. In fact, the number of cases in Strasbourg rose geometrically during that period, aliens' related cases as well. It apparently took a long time for the ECHR to be known and utilized by lawyers and, in the case of France, for individual petitions to be allowed. Most plaintiffs appealed expulsion decisions or administrative refusals of entry and residence permits. They generally purported that, in the handling of their cases, public authorities had violated rights guaranteed under Article 3 (protection against inhuman treatment) and/or Article 8 (right to lead a normal family life)

⁴⁴ Frowein 1990, 193.

⁴⁵ See *Journal Officiel*, 1 February 1981, 405.

⁴⁶ This ground for expulsion allows states to send back foreigners who, for instance, no longer receive unemployment benefits. For a debate about the reservation, see Kruyt 1978 and Swart 1978, 9.

⁴⁷ 3% if we except from the total the 50 cases which only involved Article 50 and procedural questions.

of the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as “the Convention”).⁴⁸

Article 3 is often invoked in cases of asylum-seekers whose demand for refugee status has been rejected and who claim that they will suffer inhuman or degrading treatment if they are sent back to their country of origin. At first, the Court did not find that Article 3 was violated in the individual cases that were submitted (*Cruz Varas et al. vs Sweden*; *Vilvarajah et al. vs. United Kingdom*; *Viyayanathan and Pusparajah vs. France*). More recently however, the Court stated that the absolute character of the provision means that protection cannot be ruled out by considerations relating to the public security of the state (*Chahal vs. United Kingdom*, 15 November 1996). In three cases, it found that Article 3 would be violated if the applicants were to be deported or extradited.⁴⁹ Although the Court recognizes different kinds of “inhuman treatment,” (one case involved an applicant in the final stages of AIDS), the applicants must show that they face a “real risk” if they are sent back and the Court’s standard when it comes to the burden of proof is very high.⁵⁰

The Court has also ruled that Article 8 had been violated. In cases involving foreigners who had lived in the host country since childhood and had tenuous ties to their country of origin, the Commission and the Court considered that their expulsion from the receiving country could not be tolerated even if they had an important criminal record (*Moustaquim versus Belgium*, *Beldjoudi versus France*, *Nasri versus France*, *C. Versus Belgium*).⁵¹ In a case involving a divorced foreign father of a Dutch girl, the Court found that he could not be denied entry or residence into the Netherlands so as to see his daughter (*Berrehab versus Netherlands*). Article 8 has been, in fact, one of the most dynamically interpreted provision in the Convention, not only in cases regarding aliens.⁵²

⁴⁸ Other foreigner-related cases addressed language or translation fees issues in violation of Article 6, § 3a or Article 6, § 3e : *Luedicke, Belkacem and Koç vs. Germany* (28 November 1978 decision); *Oztürk vs. Germany* (21 February 1984); *Brozinek vs. Italy* (19 December 1989 decision). See Berger 1994 for exhaustive jurisprudential details.

⁴⁹ There are *Ahmed versus Austria* (17 December 1996), *D. versus United Kingdom* (2 May 1997), and the aforementioned *Chahal* case.

⁵⁰ In the latest judgement of the Court on Article 3, a case involving a Colombian drug dealer who had released information on other traffickers to the French police, the judges did not believe that he faced a “real risk” if deported back to Columbia...(case of *H. L. R. versus France*, 29 April 1997).

⁵¹ In a very recent case, *Boughanemi versus France* (24 April 1996), the Court did find that the criminal record of the applicant weighed too heavily against him and did not find a violation of Article 8 although they acknowledged that he had family ties in France.

⁵² See Feldman 1997.

In the Convention, other provisions address more directly the foreigners' condition or could be invoked to protect other aspects of the rights of foreigners. Article 14 of the ECHR which bans discrimination on many grounds including race, color, language, religion and national origin is sometimes invoked by litigating parties in cases involving aliens yet has been deemed irrelevant by the judges.⁵³ There is no case before the Court involving human rights dispositions which specifically protect foreigners: against expulsion (Article 1, 7th Protocol)⁵⁴ and against collective expulsion (Article 4, 4th Protocol).

The right to manifest one's religious beliefs (subject to limitations) is covered by Article 9 of the Convention. Given the salience of debates on the cultural rights or religious freedom of aliens, one might have expected an appeal to the ECHR yet no case is before the Court that involves a foreigner claiming a violation under Article 9.⁵⁵ Several plaintiffs invoked violations of Article 9 before the Commission that decides on the admissibility of cases; only 4 were deemed admissible. The Commission has apparently "chosen to restrict itself in the manner in which it can interpret Article 9."⁵⁶ relying on other Convention provisions to claim that the latter was a priori incapable of accomodating certain categories of religiously-based claims for exemption from generally applicable, neutral laws. Moslem litigants did not see their cases admitted. The Commission avoided pronouncing itself on a case involving a Muslim teacher who had not been permitted to be absent to pray at a mosque on Friday afternoons (Ahmad versus United Kingdom).⁵⁷ It declared inadmissible the case of a Muslim who wanted to marry a girl under 16 in the UK (Khan versus United Kingdom)⁵⁸ and one who wanted his marriage according to a "special religious ritual" recognized by state authorities (X versus FRG).⁵⁹

Buddhist and Sikhs did not fare better. In their cases, the Commission did not "avoid the issue"⁶⁰ entirely but stated that limitations which, article paragraph 2 of Article 9 "are prescribed by law and are necessary in a democratic society" applied. According to the Commission, for various health

⁵³ Krüger and Strasser 1994.

⁵⁴ Germany and the Netherlands have yet to ratify this Protocol.

⁵⁵ Most cases have involved Greeks in their own country. For an extensive and most recent discussion of the interpretation of Article 9, see Stavros 1997. For a more general discusion of freedom of religion and international law, see Thornberry 1991.

⁵⁶ Stavros 1997, 615.

⁵⁷ case 8160/78 dated 12 March 1981.

⁵⁸ case 11579/85 dated 7 July 1986.

⁵⁹ Case 6167/73 dated 18 December 1974.

⁶⁰ Stavros 1997.

and security reasons, a Buddhist prisoner could not grow a beard which prevented his guards to identify him,⁶¹ nor could a high caste Sikh refuse to sweep his cell,⁶² nor could a Sikh motorcyclist refuse to wear a crash helmet to keep his turban on.⁶³ The Commission also declared inadmissible the two cases involving Moslem headscarves (they concerned Turkish women in their home country who had been "punished" for wearing a veil in an university and in the army rather than women migrants).⁶⁴ The Commission's argument was that they had chosen freely to attend secular institutions and they could still practice their religion outside. It is significant that national jurisdictions have taken a stronger stance on the protection of religious expression. This was the case of French Council of State's 1989 recommendation following the Creil *foulard* affair. In Germany as well, courts have given religious freedom priority over the state mandate to provide education in cases involving Moslem girls.⁶⁵ In fact, after 20 years of unsuccessful applications to Strasbourg in cases involving religious or cultural minorities, calls for a new Optional protocol specifically guaranteeing the rights of minorities have been heeded in order to circumvent the prudence of the Commission and the Court.⁶⁶

Why is ECHR jurisprudence on aliens limited to condemning states for violating Article 8 (right to lead a normal family life) and 3 (protection against inhuman treatment)? Perhaps, it highlights a certain dynamic: Once the Court opened a breach of redress by recognizing the pertinence of Article 3 and 8 in cases of expulsion, lawyers and associations engulfed themselves in it so as to find similar cases to fatten the jurisprudence in this area or to uncover other types of application. Ultimately, the goal is to publicize the Court decisions at the national level so that not only national tribunals take into account the Convention's articles and the relevant Court decisions but also governments are deterred from challenging family reunification principles in new regulations. Another factor may be the prudence of the Court when it comes to burning political issues such as immigration or multiculturalism. It balks at solving

⁶¹ Case 1753/63 versus Austria dated 15 February 1965.

⁶² X versus United Kingdom. Case 8231/78 dated 6 March 1982.

⁶³ X versus United Kingdom. Case 7992/77 dated 12 July 1978.

⁶⁴ See decisions 16278/90 in *Karaduman versus Turkey* and 18783/91 both dated 3 May 1993.

⁶⁵ Federal Government's Commissioner for Foreigners' Affairs 1994, 50. This state of affairs stands in contrast with the Federal Constitutional Court decision banning crucifixes in Bavarian public schools.

⁶⁶ See Poulter 1997. The final blow to lawyers may have been *Buckley versus United Kingdom*, a case involving a British gypsy when the Commission set a precedent by admitting her case but the Court found no violation. The Commission had admitted her case on the grounds that Article 8 protected her right to lead her life as she wished including in a caravan-dwelling.

nations' problems and taking clear-cut sides in controversial issues. This is a matter of maintaining credibility and legitimacy rather than having decisions dismissed as "judicial meddling" by irate signatory states. The fact that the ECHR has not found any state to violate Article 14 for discriminating on the basis of national origin is telling in this respect.⁶⁷ The ECHR has perhaps chosen to ascertain its authority slowly.

Notwithstanding the reasons, the ECHR has only been able to pronounce itself on narrow aspects of a foreigner's rights. Even in these cases, the Court has clearly circumscribed the conditions under which the right protected is deemed violated. In all their decisions, judges reaffirm that they do not forbid states from regulating the entry and stay of foreigners nor do they have to judge national immigration policy. Decisions actually discuss a number of legitimate reasons why a state may want to limit entries such as the economic well-being of a country or expel individuals because of threats to public order (to justify expulsions). These restrictions are vaguely defined as applying if they are "necessary in a democratic society" (Article 8, § 2). The judges estimate the proportionality between the legitimate goal of a measure or a law, the means used to achieve this goal, and the damage done to the individual(s) as measured by the violation of Convention rights. For instance, the Court stated in the *Abdulaziz* case that "regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual. [...] a State has the right to control the entry of non-nationals into its territory. [...] The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept non-national spouses for settlement in that country."⁶⁸ The same wording was used again in the *Ahmut versus Netherlands* decision (28 November 1996), a case in which the Court deemed it possible for the claimant to live with his partner in his country of origin.

Rather than breaking new grounds and going where no national court had gone before, the ECHR confirmed and clarified the pertinence of preexisting legal principles. As in other areas, it tried to coordinate national jurisprudences

⁶⁷ One famous immigration-related case did involve a violation of article 14 but it was a case of sexual discrimination. The foreign husbands of foreign women legally residing in the United Kingdom (or of British women) were not allowed to join their wives in England following the 1980 Immigration Act whereas it was much easier for foreign wives to reunite with spouses in the United Kingdom. In *Abdulaziz, Cabales and Balkandali vs. United Kingdom*, the Court unanimously acknowledged the violation (28 May 1985).

⁶⁸ See European Court of Human Rights 1985, 34. It is only if they cannot go anywhere else (as is the case of a couple involving a refugee) that the state has an obligation.

rather than subjugate national courts and to harmonize preexisting practices rather than impose new ones. It is not fortuitous that the main jurisprudence on aliens centers around Article 8 on family life. All of the countries studied here have a clause inscribed in their Constitution on the right to lead a normal family life which resembles Article 8 and they also had made provisions for family reunification. In the Netherlands, Article 10 of the Constitution protects private life, Article 6 of the German basic Law does the same. In France, as early as 1978 the highest administrative tribunal struck down government suspension of family reunification restrictions on the grounds that it was contrary to the *principe général du droit* (general legal principle) that protected an individual's right to a normal family life (*Arrêt GISTI*). In Germany, in 1983, the Federal Constitutional Court forced Bavaria and Baden-Wurtemberg to go back on a plan to establish a three-year waiting period for spouses before family regrouping in Germany was allowed. The Court deemed it contrary to Article 6 of the Basic Law on family life, a constitutional provision taken into consideration in residence permits and expulsion court cases.⁶⁹ European human rights provide us with insights on the transmission of norms: national legal norms have been the pillar on which international ones have been elaborated.

The "new" norms that emerged from European jurisprudence only gained currency nationally when comparable and compatible norms already existed at that level. Some IR scholars have also underlined that "new ideas are more likely to be influential if they 'fit' well with existing ideas and ideologies in a particular historical setting."⁷⁰ The persuasiveness of ideas stems in this respect from their ability to insert themselves within existing paradigms.⁷¹ Not expelling a young foreigner back to a country where he has no family ties is indeed a norm that is more likely to be understood if the host society and its legal institutions believe in the importance of family life. The import of norms in this view stems from their capacity to evoke commonly held beliefs and interpretations. This is in some ways commonsensical: one accepts what one already knows. Ideologies, beliefs, culture are usually vague enough to accommodate a wide range of ideas including conflicting ones. Consequently, it may be possible most of the time to find *a posteriori* domestic beliefs that 'fit' international norms. The more specific point here is that the international norms that have been incorporated by national jurisprudence are important constitutionally protected principles.

⁶⁹ Ansay 1992.

⁷⁰ Sikkink 1991, 26.

⁷¹ For an application of the notion of paradigm to politics, see Hall 1993.

The ECHR's jurisprudence has been circumscribed to very specific areas of rights with respect to the protection of aliens. This has to do with the logic of "increasing returns"⁷² of litigation whereby one success in court based on a particular provision leads lawyers to multiply cases based on those grounds. In addition, it can be explained by the preexistence of national jurisprudence in these specific areas. The Court has not exploited the Convention fully in this respect. The ensuing question is whether that particular jurisprudence has been incorporated in national law, or taken into account by policy-makers.

2. *The national incorporation of ECHR norms*

Drawing on the experience of France, Germany and the Netherlands, I assess the role of domestic jurisdictions and actors in the process of incorporation of ECHR norms. How can the jurisprudence of the ECHR add to national practices? One of the main means of exerting pressures on nation-states consists in shaming violators by publishing court decisions and reports. Within the European Convention of Human Rights framework, the Committee of Ministers can order the Commission to do so. Yet, nearly all cases are reported so that "whatever force lay in this threat has now been lost."⁷³ More leverage is gained from "institutional cooptation,"⁷⁴ in particular when national courts refer to international human rights standards in their pronouncements. Vincent Berger, division head at the Clerk's Office of the Court, speaks of the "preventive consequences" of Court cases such as when a government changes domestic regulations or makes reform promises during a legal procedure in Strasbourg; or, in countries where an individual right of petition has been granted, when national tribunals take greater care in respecting the Convention so as not to have their decisions overruled in Strasbourg. He acknowledges that these effects are very far from systematic.⁷⁵

The first striking aspect of national implementation is that has been delayed or non-existent in the cases studied. In **France**, international human rights norms were drawn upon only starting in 1991. France ratified the 1950 Convention in 1974 and waited until 1981 to permit individual petition under Article 25. In 1988, the French Council of State gave full effect to Article 55 of the Constitution under which treaties which are signed, ratified and published take precedence over domestic statutes in the *Arrêt Nicolo*. One had to wait two

⁷² For an application of the notion of "increasing returns" to non-economic phenomena, see Pierson 1997; On the original concept in economics, see Arthur 1994 on path dependence and Blanchard and Summers 1987 on hysteresis.

⁷³ Mower 1981.

⁷⁴ Moravcik 1994.

⁷⁵ Berger 1994, 430.

more years however before the Council of State held that Article 8 of the European Convention could be used whenever the legality of decisions taken against aliens were challenged on those grounds.⁷⁶

Contrary to the French, the **Dutch** promptly ratified the European Convention (in 1954) and allowed individual petition. Notwithstanding, national judges and authorities ignored the treaty for about a quarter of a century.⁷⁷ This has been explained by ignorance, the lack of prestige of Strasbourg and the belief that "the invocation of the Convention was a sign of weakness and was only adhered to when no other reasonable argument was available."⁷⁸ The Dutch Constitution regulates the internal force of treaties in a monistic way and, in its 93rd Article, states that "self-executing" treaty provisions will be binding from the time of publication. However, until the 1980s, judges did not deem the ECHR self-executing. They preferred to apply a comparable provision of Dutch law and, in cases when they did apply the Convention, they did so in a very restrictive way.

Postwar **Germany** counts among the few countries with extensive judicial review and its Basic Law offers strong human rights guarantees. Very few complaints have been filed with the European Commission of Human Rights.⁷⁹ Furthermore, the Federal Constitutional Court can only base its decisions on the Constitution. Consequently, on many occasions, the Court has held that a constitutional complaint cannot be based on an alleged violation of the European Convention. It only accepts to interpret the Convention in cases in which a court has violated a plaintiff's fundamental right to equality before the law under Article 3 of the Basic law⁸⁰ by mis-applying or disregarding the Convention in an arbitrary fashion.⁸¹ Whether this reluctance demonstrates a fear of being overruled by the ECHR, a desire to avoid having to bring in the complexity of the Convention's concepts and jurisprudence, or a will to keep its

⁷⁶ The landmark decisions were taken in the Beldjoudi (18 January 1991), Babas and Belgacem (both 19 April 1991) cases.

⁷⁷ Meyjer 1985, 11.

⁷⁸ Zwaak 1989, 40.

⁷⁹ One of the cases before the ECHR (Luedicke, Belkacem and Koç) regarded the right to a free interpreter during a legal procedure for a non-German speaker. After Germany was condemned, the German Parliament amended the relevant legislation. It has not done so in other cases when Germany was condemned however.

⁸⁰ Or in cases when a state law is deemed incompatible with the Convention which has the statute of a federal law.

⁸¹ See Steinberger 1985. In two 1987 decisions, it found no violation of the law yet, later, it created a special appeal for violation of the Convention and equality before the law in the lower courts. Karlsruhe has not yet had the opportunity to apply this rule. See Frowein: 1992, 122.

jurisdiction separate from the European Court to avoid contradictions between the two courts, this state of affair limits the impact of the European Human Rights Convention in Germany, although administrative courts should apply and respect it.

So can one find concrete evidence showing that national courts and policy-makers are taking ECHR jurisprudence into account? When asked about the incidence of the Convention on immigration policymaking, a German Interior Ministry official dismissed it by saying that the Convention had been ratified in 1952 and that its mark remained to be seen in the elaboration Aliens Acts including the 1991 one.⁸² The statement is almost true: there is one mention of the Convention in the Aliens Act. What he meant is that the Convention does not lead to self-censorship on their part. The government here is in harmony with court records. They have generally preferred to refer to ECHR decisions when the latter display judicial restraint. For instance, in 1982, when the Highest Administrative Tribunal examined the case of an adult alien who wanted to join his parents in the FRG, it referred to a 1977 decision of the European Commission of Human Rights to state that no right to a residence permit could be derived from article 8.⁸³

In France, the ECHR has served to expand the scope of judicial review in France and, since 1991, several government measures and actions regarding foreigners have been struck down using Article 3 or 8 of the ECHR. During the 1993 reforms on the entry and stay of foreigners, Articles 23, 25 (last paragraph) and 26 relating to expulsion had to be modified to take new Strasbourg-based standards into account. Government internal documents now include a sort of warning against possible litigation on the basis of Article 8.⁸⁴ The visas on expulsion decrees also systematically mention the Convention article.⁸⁵ The Interior Ministry is not particularly troubled by the incidence of international law and considers it simply a matter of arguing well either the non-existence of strong ties in France or the overriding danger to public safety. Based on the report of an academic familiar with the jurisprudence of Article 8, a special residence permit labelled "private and family life" may be delivered to foreigners under threat of expulsion yet with no ties outside France.⁸⁶ Article 3

⁸² Interview with Mr. Malwald, Federal Ministry of the Interior, Bonn, 1995.

⁸³ Steinberger 1985.

⁸⁴ See "les évolutions du droit des étrangers" internal Interior Ministry document (procured during an interview with Oriane Fournier-Belmont, French Ministry of Interior, Paris, 1994).

⁸⁵ The automaticity of the mention is a way of warding off court cases or showing good will in appeals.

⁸⁶ See the report by Patrick Weil (Weil 1997). The reform was discussed in Parliament in the fall of 1997.

of the ECHR which prohibits inhuman or degrading treatment of individuals is also beginning to be taken into account at least on paper. Administrative tribunals and the Council of State thus annulled a number of *arrêts de reconduite à la frontière* (orders to leave the territory). The Interior Ministry in a 1991 circular listed the countries where foreigners could not be sent back. It also now motivates its decisions in the written orders.

There is a similarity in the use of Article 3 and 8 of the ECHR. They have affected the outcome of individual cases and, in cases where the government was faced with a large amount of litigation cases, administrative procedure. To understand these developments, one cannot underestimate the role of French lawyers and associations such as the GISTI (*Groupe d'Information et de Soutien aux Travailleurs Immigrés*) who built more and stronger cases referring to the ECHR as well as that of a minority of magistrates who believed that France should respect its international engagements.⁸⁷ Rather than an "epistemic community," one can speak of a motley crew made up of actors with different motivations. Magistrates within the Council of State exerting internal pressure for the incorporation of the ECHR were concerned less with human rights norms or aliens rights as such than with competition with other jurisdictions who were already applying the Convention⁸⁸ and the risk of being short-circuited by international courts.

In the Netherlands, the attitude of the courts towards human rights treaties evolved in the late 1970s and early 1980s, and the Supreme Court took a few landmark decisions invoking the ECHR. It is within this context that one should situate the 1986 ruling of the Supreme Court which stated that the President of a District Court had been right to annul a deportation order based on the right to lead a normal family life although the Ministry of Justice had argued that this right only applied to allowing family members to join a foreigner already established in the Netherlands.⁸⁹ The political climate probably played a role. The decision of the Court followed the enactment of a liberal minority policy and thus was synchronized with a general improvement in the rights of foreigners (they first voted in local elections in 1986). Now, the Judicial Section of the Council of State, the highest administrative tribunal responsible for reviewing administrative decisions including those taken by the Ministry of

⁸⁷ Interview with Roger Errera and Olivier Stirn, French Council of State, 1995 and 1996 respectively. Interview with Danièle Lochak, president of the Groupe d'Information et de Soutien aux Travailleurs Immigrés and law professor, Paris, 1995.

⁸⁸ The *Cour de Cassation* had recognized the superiority of international agreements as early as 1975 (*arrêt Vabre*) so the administrative courts were trailing behind.

⁸⁹ This decision came a year after Strasbourg had condemned the Netherlands in the aforementioned Berrehab case.

Justice in the area of immigration and asylum, has crafted precise criteria for the taking into consideration of Article 8 such as the age of children, regularity of contacts, means of financial support.⁹⁰ Furthermore, the Judicial Section of the Council of State has also decided that divorced women in the country of origin could join their former family in the Netherlands if they are socially isolated.⁹¹ The limits of the Convention's impact, however, are those imposed by Strasbourg case-law which the Council of State often quotes: "regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual."⁹²

The activism of public interest law organizations has been instrumental in insuring that foreigners benefited from the provisions of international law (in particular, the Working Group for Legal Aid on Immigrants). They have done so by filing suits to create case law and through lobbying as well (e.g. by providing legal arguments to MPs who needed concrete arguments while building coalitions to reform foreigners law).⁹³ The Dutch case bears resemblances with the French one insofar as the evolution of the judiciary towards international law and the imagination of local activists looking for new bases for reform coincided to result in a limited number of cases in changes in administrative criteria or practice. This grouping of factors seems to have been missing in Germany. There, the legal profession frowns at excessive interference from supranational jurisdictions and texts.⁹⁴ Not just the courts but also many makers of legal doctrine have argued against the implementation of international law. For instance, prominent scholars have held that the European Social Charter (Article 19 and 20 on migrants' rights) could not be directly applied in Germany.⁹⁵

It should also be underlined that governments pay attention when they are condemned by the ECHR but do not reconsider their policies when other countries are condemned on other aspects of the issue. Both France and the Netherlands were involved in cases related to the application of Article 8. The situation of the plaintiffs were different. Each country focused on clarifying administrative practice to avoid further similar situations rather than on the significance of article 8 as a whole. Germany was not condemned on family life issues. The cases involving foreigners regarded court interpreters' fees. Germany considered changing the law on that issue but disregarded the

⁹⁰ Badoux 1992.

⁹¹ Badoux 1992. For the ECHR interpretation of these notions, see Madudeira 1989.

⁹² European Court of Human Rights 1985, 34.

⁹³ Groenendijk 1980.

⁹⁴ Frowein 1992, 125.

⁹⁵ Hailbronner 1989, 401.

Strasbourg case-law on family life. The evidence contradicts the argument that a transnational human rights norms uniformly pervade national scenes. Similarities in the rights of foreigners across countries are due to parallel developments rather than a convergence imposed from above.

Moreover, there remains cross-national differences in the number of recourses to the ECHR and in its impact and they originate in the judicial politics of the signatory states. In our three cases, until December 1993, 27 affairs concerned Germany in the Court and Germany was condemned in 10 (in 37% of the cases). France was involved in 44 Court decisions and the ECHR found that there was a violation in 23 of them (58% of the cases). The Netherlands was also condemned in 58% of the cases yet only 29 decisions involved the Dutch state.⁹⁶

There are also differences in the impact of the ECHR jurisprudence. They are perhaps brought about more by differences or lags in legal culture and the strategies of pro-migrant national activists than by legal rules *per se* although German judicial review provisions seem an hindrance to ECHR influences. To summarize my findings, some effects of the ECHR jurisprudence are observable in the Netherlands starting in the early-to-mid 1980s, early 1990s in France. In both countries, there was an active public interest law organization that multiplied cases before the courts. They succeeded only once the attitude of the latter towards international law changed which took longer in France who was the last to ratify the whole Convention and allow individual petition. In Germany, lawyers and judges seem to focus on the German Basic law more than on the Convention. Consequently, one sees both less recourse to and less impact of the ECHR.

Long before ECHR and ECJ decisions on the matter, improvements in foreigners' rights had been achieved through other means and activists had availed themselves of other -nation-based- means. This means ECHR jurisprudence fails a simple causal test of antecendence. Opportunities for the improvement of the status of foreigners have emerged because of national traditions embodied in law prior to the emergence of a postwar human rights discourse. This is the case of family reunification guarantees in Germany which were secured because a right to family life is inscribed in the Fundamental Law of 1949. Its Sixth Article reflects a concern for traditional family values as constitutive of the national character which antedated the war. In France, administrative judges were defending the rights of foreigners on human rights grounds before 1991 and, in particular, their right to lead a normal family life.

⁹⁶ Source: Berger 1994, annex D.

The aforementioned 1978 *Arrêt GISTI* by the Council of State was an important episode in an arm wrestle opposing the executive and the administrative court on immigration measures⁹⁷. It was a clear judicial affirmation of the right of family reunion. Furthermore, French domestic law had already incorporated this right, in particular in the main postwar text regulating immigration: Article 25 of the *ordonnance* of 2 November 1945 lists a number of categories of aliens who may not be ordered to leave the country because of their family and social situation.

The role of high courts as agents of normative change has been key in the area of aliens' rights. This has been especially the case in Germany where there was no legislative change between 1965 and 1991 and the 1965 Aliens Act gave the administration great discretion and firmly distinguished fundamental liberties for Germans only and those for all.⁹⁸ In Germany, extensive judicial review has favored the development of domestic legal norms and it is the latter that are referred to in aliens' law cases. Courts have applied the rule of proportionality (Article 20, § 3 of the Basic Law), that implies that the interest of the state had to be balanced against the constitutional interests of the foreign worker. Therefore, for instance, foreigners can no longer be deported for committing a small traffic offence.⁹⁹ The concept of entrenchment (*Verwurzelung*) which means that the longer a foreigner stays the more restricted administrative discretion should be has also been important. Courts affirmed that residence and permit renewal guarantees had to be granted to foreigners who have a right to develop freely one's personality as it is stated in Article 2 of the German constitution and thus must be given the opportunity to plan their future.¹⁰⁰ Therefore, domestic norms have played a more major role in determining the current legal status of foreigners than international legal norms as soon as domestic courts entered the fray of immigrant politics.

Finally, the evidence that policymakers themselves refer to European human rights to frame their policies towards foreigners is very scant. In other words, international legal actors may influence national legal ones but not directly national administrative or political ones. In legislative minutes, official reports, press coverage and during interviews with civil servants and politicians in charge of aliens' issues, references to international human rights standards

⁹⁷ See Wihtol de Wenden 1988.

⁹⁸ Dohse 1981.

⁹⁹ The first important Federal Constitutional Court decisions date from 26 September 1978 and 7 January 1979 (*Entscheidungendes Bundesverfassungsgericht* 1978, 168 and 185; *Entscheidungendes Bundesverfassungsgericht* 1979, 166 and 175).

¹⁰⁰ See Schwerdtfeger 1980. As previously mentioned, Article 6 of the Basic Law on protection of the family has been important in some cases as well.

are rare. Evoking national "traditions of tolerance" is more common. In official policy documents, the main justification for bettering the status of aliens is "the easing of social tensions" rather than a commitment to liberal values or human rights. In 1976, the French Secretary of State in charge of foreign workers, Paul Dijoud, announced a range of new social programs and benefits for migrants and their family that he deemed "indispensable if we are to avoid, in the near future, social tensions that will be almost impossible to surmount."¹⁰¹ This argument can be found almost word for word in Dutch and German policy documents.¹⁰² They recuperate in this way the arguments of the migration control camp who also predicts social chaos if migration flows do not abate. Moreover, policy-makers consider some provisions for foreigners as benefits rather than rights as is the case for certain social rights (services for asylum-seekers, non-contributive welfare programs) and for access to employment. The rationale for change in these cases is therefore economic, or driven by interest groups.

My study of the ECHR and its incorporation has shown the limits of European human rights legal norms in protecting aliens. To better understand what may explain the uneven and limited impact of this jurisprudence, it may be fruitful to compare the ECHR with another European court, the European Court of Justice. The comparison of the two jurisprudences towards aliens highlights the features of the international organization that impede the development and diffusion of norms.

¹⁰¹ *Le Monde*, 5 November 1976.

¹⁰² For German examples of official reports expressing fear of social tensions, see Federal Ministry of Interior 1993; Federal Commissioner for Foreigners' Affairs 1994; Press and Information Office of the Federal Government 1993. For Dutch examples, see WRR 1979 and Ministry of Interior of the Netherlands 1983. For additional French examples, see Secrétariat aux Travailleurs Immigrés 1976 and Ministère des Affaires Sociales 1986.

II. Comparing the ECHR with other sources of normative change: The European Court of Justice and third country nationals

Another set of European organizations likely to affect domestic policy changes is the European Union. In particular, scholars of the European Union have identified the European Court of Justice as a crucial organization for the advancement of European integration and an example of an international agent acting against the interests of the principal (the member states) that led to its creation.¹⁰³ This section examines the ECJ's jurisprudence concerning foreigners who are not citizens of a member state. In this way, I can compare the ECHR's record and influence.

In small and tortuous ways, the legal status of third-country nationals has been affected by the jurisprudence of the ECJ in the area of freedom of movement. Chronologically, the first example regards the family of a Community national who exercises his/her freedom of movement in another member-state. They are entitled to the same residence, work and welfare rights as a member-state national even if they are not EU nationals; the only difference is that they may be required to obtain an entry visa.¹⁰⁴ The ECJ has taken a robust approach to this obligation of non-discrimination yet it has repeatedly made clear that foreign spouses do not have rights of their own and only derive them from the Community worker moving to another member-state.¹⁰⁵

The second instance of Community law affecting national policy towards foreigners is still a burning political issue in some member-states. It regards the status of non-EU workers who are employed by Community firms performing services in another member-state. In the *Rush Portuguesa* decision of 27 March 1990, the ECJ reiterated that the provisions for the suppression of restrictions to the freedom of establishment and the freedom to deliver services¹⁰⁶ entailed that a company could move with its own staff. If some of the company employees are third-country nationals, member-states cannot refuse them entry to protect

¹⁰³ On the influence of the European Court of Justice, see Burley and Mattli 1993; Garrett's rebuttal (1995) and Mattli and Slaughter's rejoinder (1995) and update on ECJ studies (1998). Garrett 1992; Garrett and Weingast 1993. See also Pierson 1996.

¹⁰⁴ See Articles 10 and 11 of Regulation 1612/68 and Articles 1, 2, and 3 of Directives 73/148, 90/364, 90/365, 90/366.

¹⁰⁵ Also, the Court has iterated that EC law would not apply to a non-EC national whose European spouse has not moved to another member-state. For details on the jurisprudence on these derivative rights, see Lanfranchi 1994, 156-170.

¹⁰⁶ They are contained in Article 52 to 59 of the Treaty of Rome and, since 1974, have direct effect. See ECJ decisions in the *Reyners* case (21 June 1974) and the *van Binsbergen* case (3 December 1974).

their own labor market on the grounds that immigration from non-EU states is a matter of national sovereignty. It is deemed a discrimination against the company (not the employees) yet, by the same token, non-EU nationals benefit from a derived freedom of employment in these cases for as long as they work for the company. In effect, although the principle of "Community preference" should give priority to EU nationals looking for employment, non-EU nationals can invoke the same principle if they work for a EU firm.¹⁰⁷ Walking along Berlin construction sites and hearing the workers speak Portuguese, English and Arabic, one realizes that most of the construction teams contracted include EU and non-EU workers but very few Germans. The debate is on-going between unions, employers and the government since what may be seen as a right for foreign workers has been construed by unions as a form of "social dumping."

Other recent developments in ECJ jurisprudence deserve mention. They regard the application of the 1964 EC/Turkey Association Treaty and also of the cooperation agreements signed by the EC and North African countries which the EEC had entered into under Article 238 of the Treaty of Rome.¹⁰⁸ Because of the high numbers of Turkish and North African workers in France, Germany and the Netherlands, any provision on freedom of movement for the nationals of the signatory countries had the potential to consolidate significantly the status of a large number of foreign residents.

After a long dormant period, important steps towards their implementation were taken in the 1980s mainly as a result of ECJ activism. The purpose of the EC/Turkey agreement was to achieve Turkey's entry in the EU. As it met with political resistance by EC member-states,¹⁰⁹ this goal was not achieved nor was freedom of movement implemented as required by Article 36 (P) of the Agreement. The Council of the Association reached a consensus in 1976 and 1980 on the right of Turkish workers to access the labor market freely after a certain period of residence and employment in a member-state yet explicitly provided for further implementation of current domestic regulations.¹¹⁰ As Kay Hailbronner and Joanne Katsantonis suggest, "member-

¹⁰⁷ In fact, there is a project for a Directive to solve this sensitive issue (COM (91) 230 final). See Lanfranchi 1994 for an analysis.

¹⁰⁸ The Maghreb countries with large contingents of its nationals settled in Europe who have concluded cooperation agreements with the EEC are: Algeria (See EEC Council Resolution n° 2210/78); Morocco (See EEC Council Resolution n° 2211/78) and Tunisia (See EEC Council Resolution n° 2212/78). All the resolutions date from 27 September 1978.

¹⁰⁹ This was actually due in part to the fear of increased migration flows from Turkey into Germany and other receiving countries.

¹¹⁰ EEC-Turkey Association Council Decision 1/80 and 2/76. Article 6 of Decision 1/80 stipulates that Turkish citizens already employed for a year in a EC state (a) have a claim to

states clearly intend association law to be incomplete in the sense that no individual rights could be inferred from the Council's decisions."¹¹¹ Yet, a few ECJ decisions in the late 1980s were diametrically opposed to what states had intended. The ECJ ruled that nationals of the association contracting states had directly enforceable rights in a way which made them part of the *acquis communautaire* and had to be upheld by national courts. In the 1987 Demirel case involving the right of a Turkish worker's wife to join in Germany, the ECJ held that Article 238 of the Treaty gave the Community competence to regulate the entry and stay of the nationals of EC-associated states whenever the agreement contained "a clear and precise obligation." This decision established EC competence in this area. In 1990, the ECJ went much further when it ruled in the Sevince case that a right of residence could be implied from the Council decisions by arguing that, although these decisions were concerned with the right to employment, the latter would be useless without the existence of a right of residence. A year later, in the Kziber case, the ECJ interpreted an equal treatment clause in the Cooperation Agreement with Morocco with the same line of reasoning by vindicating a Moroccan living in Belgium's application for special unemployment benefits. This benefit is designated as one of the social benefits covered by Article 2 of regulation 1612/68 applicable to EC migrant workers. In effect, the Court neglected the difference between an EC national and a non-EC national covered by a Cooperation Agreement; the judges applied the principles of Community law rather than the limited framework of association law.¹¹²

Member-states were furious, especially in Germany after the Kus case.¹¹³ The Federal Ministry of the Interior, the Ministry on Social Affairs criticized the ECJ decisions. Both the *Bundesverwaltungsgericht* (the highest

renew their work permit with the same employer, (b) are allowed to respond to another offer of employment for the same occupation after three and (c) have a right to access the entire job market after four. It also gives family members the right to work after 3 years of legal residence and complete freedom of employment after 5 years. Finally, children of Turkish workers may work provided that they have completed a course of vocational training in the host country. Another Council decision regards access to the welfare state. Decision 3/80 gives Turkish citizens residing in a EU country "the same rights and obligations with respect to social security benefits as citizens of the state." See Faist 1994, 15.

¹¹¹ Hailbronner and Katsantonis 1992, 57.

¹¹² The framework is laid down in the Vienna Convention on the law on treaties. The Court overlooked such principles as reciprocity (there are no unemployment benefits in Morocco).

¹¹³ In the latter, a German court asked whether the requirement to renew a work permit presupposed a residence permit requirement and whether this only applied to Turks who came as workers. The ECJ had answered the first query affirmatively and had stated that a right of residence should be extended to foreigners benefiting from family reunion measures. See deutscher Bundestag 1993.

administrative court) and the *Bundessozialgericht* (the highest social court) stated that decision 1/80 did not constitute law that Turkish citizens could invoke.¹¹⁴ The legal reasoning of the ECJ has been deemed dubious by most even by those who welcomed the rulings such as the Commission. This is not why member-states reacted so virulently. European countries jealously guard their autonomy when it come to the handling of immigration issues and, in this field, EU competence is not to be easily recognized.

The "judicial capital [...] which is involved each time that a court breaks with the past and makes a new development"¹¹⁵ may have seemed prohibitive for the ECJ. In a spring 1995 ECJ decision, judges retreated to some extent from their previous stance and did not side with the plaintiff, a Turk with a permanent work incapacity whose residence permit was not being renewed. In any case, member-states have taken steps to preempt future developments in association treaties influence. As these treaties are being renegotiated, new ones have been signed (with Poland, Hungary and the former CSFR) and others are under discussion, national member-states clearly wish to exclude freedom of movement clauses.¹¹⁶ Their attitude is but a sign that, however indirect and unexpected, the impact of the agreements signed with countries of emigration instilled fear among national governments. The fact that the Treaty on European Union does not provide for ECJ automatic judicial review of the decisions taken by the Justice and Home Affairs so-called "third pillar" is another illustration that member-states are making sure the ECJ will not be an hindrance in their plans to restrict aliens' rights.¹¹⁷ This attitude perhaps stems from the fear that international law may further entrench existing rights and make restrictions or exceptions arduous in the future.

In reviewing the ECJ record in light of our original question on the import of a transnational human rights discourse, it is significant that the jurisprudence on third-country aliens was not based on human rights considerations. The Court invoked freedom of services or association treaty provisions rather than human rights principles. Although the Court constantly reiterates that it is its duty to insure observance of fundamental rights in the field of Community Law, it does so in a prudent and self-limiting way. In the case of third-country nationals, it has avoided this tack altogether. We find in the judgments as in the Treaty the "dehumanizing" element which consists in "treating workers as 'factors of production' on a par with goods, services and

¹¹⁴ Faist 1994.

¹¹⁵ Weiler 1993, 253.

¹¹⁶ Interview with Denis Martin, Directorate General V, European Commision, Brussels, 1995.

¹¹⁷ See Article L, Title VII of the Treaty on European Union.

capital.”¹¹⁸ This is normal given that the ECJ’s legal bases are free movement clauses not human rights treaties. Nevertheless, it suggests that, whatever effect of international norms we observe domestically, it is more likely to depend on the characteristics of the international organization that seeks their incorporation than on the characteristics of the norms themselves. With a narrower basis to protect third country nationals than the ECHR, the ECJ has developed a jurisprudence on third country nationals that has led member states enough for them to rewrite treaties and find ways to avoid the ECJ’s power of review.

III. A transnational network: The missing element?

In this last section, I would like to discuss a factor that may contribute to the shortcomings of European norms protecting aliens and the fact they are unevenly adopted across nations. This factor can be defined as the lack of a coherent transnational issue network. Were such a network exist (and I realize the limits of the counterfactual argument), one could expect a more significant impact of international norms. By transnational network, I mean one that involves “regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization.”¹¹⁹ In fact, theories of transnational relations do not preclude the relevance of issue-oriented networks and cognitive and normative exchanges that affect the world view and margin of maneuver of national actors.¹²⁰ In particular, norms diffused by networks made up of subnational and supranational actors have been said to influence national policies relating to human rights in South and Central America,¹²¹ the end of apartheid in South Africa,¹²² and democratization in Eastern and Central Europe.¹²³ This is what Kathryn Sikkink calls principled issue-networks. In western Europe, Sidney Tarrow recently underlined the growing Europeanization of social movements and the transnational character of movements that led to normative change in areas such as environmental

¹¹⁸ Weiler 1993, 250.

¹¹⁹ Risse-Kappen 1995, 3.

¹²⁰ See the introduction of Risse-Kappen 1995 for a review of the transnational relations literature. Thomas Risse-Kappen has stressed the role of the state and societal context in understanding variations in the impact of transnational phenomena. In the case at hand, it could compensate for differences in the legal systems of the three cases.

¹²¹ Sikkink 1993a.

¹²² Klotz 1995.

¹²³ See, for instance, the chapter by Chilton in Risse-Kappen 1995 and Thomas 1995.

policy.¹²⁴ The question remains whether, in the area of aliens' rights, there is a network made up of supranational, subnational actors, and also foreign powers that has organized to militate in favor of the rights of aliens and help diffuse human rights norms.

In Europe, there are supranational actors that could join forces with NGOs and migrant groups to push for aliens' rights. The Commission and the Parliament have tried, whenever possible, to consolidate the legal status of third-country nationals. They even supported reforms such as rights of political participation for migrants that were very controversial in countries such as Germany or France. The 1975 Vetter report of the European Parliament called for an opening of local elections to settled foreign residents.¹²⁵ The Commission has pronounced itself frequently in favor of foreigners' consultation boards and associations.¹²⁶ Yet, member-states have refused to delegate competence in the area of migration control and immigrant policy to the EU and have been able to keep this policy realm a matter for concerted action.¹²⁷ In 1985, the Commission issued new guidelines on migration¹²⁸ and argued that integration policy entailed a better access to rights for foreign residents. In July, it adopted a Decision which set up a procedure for prior communication and consultation of new policy towards third-country nationals. Five member-states (including the three countries studied here) contested the move successfully: the ECJ annulled the Decision in 1987.¹²⁹ Instead of member states involving the Commission, a plethora of inter-governmental institutionalized round-tables and agreements outside Community framework flourished (the "Ad Hoc Immigration Group", TREVI, the coordinating "Rhodes group" and the Schengen agreement). Although Title VI of the Maastricht Treaty formally places discussion of conditions of entry and residence of non-EU nationals under the EU umbrella, only a unanimous Council recommendation followed by ratification in the member-states can give the ECJ jurisdiction to interpret recommendations and solve disputes and only the Council can transfer competence to the

¹²⁴ Tarrow 1995. He does point out in Tarrow 1996 that transnationalism is not a new phenomenon however.

¹²⁵ Wihtol de Wenden 1993, 33.

¹²⁶ Commission of the European Communities 1994.

¹²⁷ Callovi 1994.

¹²⁸ Commission of the European Communities 1985.

¹²⁹ See 9 July 1987 decision in joint cases 281, 283-5, 287/85, Rec. 1987, 3023. The Single European Act which dates from the period made no provisions for common policies in the area of immigration and explicitly excluded measures regarding the free movement of third country nationals from qualified majority voting (Article 18, § 2). An appendix states that "nothing in these provisions shall effect the right of Member States to take measures as they conceive necessary for the purpose of controlling immigration from third countries" (Official Journal of the European Communities 1987).

supranational system of decision-making.¹³⁰ In brief, the system resembles that of inter-governmental groups. This has prompted Andrew Clapham to state that, "paradoxically, the Community has rights without responsibilities, rights to demand that member-states create a frontier-free Europe but no responsibility to ensure that this is done in accordance with the protection of human rights; this task is left to national and international machinery."¹³¹

There has been little pro-migrant mobilization attempts at the EU level. Studies on the emergence of trans-national ethnic organizations and EU-level lobbying activities on the part of migrants all suggest that Europe is not yet seen as the relevant interlocutor in this policy area.¹³² Whereas one could see Europe as a new political space for migrants to express their claims, little use has been made of this supranational "political opportunity structure."¹³³ During the Intergovernmental Conference (IGC), two small NGOs based in Brussels (the Migration Policy Group and Starting Line) have sought to put issues such as racial discrimination and a common status for third country nationals on the agenda. Notwithstanding, they cannot be likened neither in size, means, nor influence to other EU lobbies. There is also a Commission-sponsored Forum of Migrants made up of various types of immigrants, some foreign others not, from around Europe. They have had a strenuous time avoiding in-fighting among certain ethnic groups and unearthing a common agenda given the diversity of their national situations.

As long as the nation-state is the primary unit for dispensing rights and privileges, the nation-state remains the main interlocutor, reference and target of interest groups and political actors including migrant and their supporters. Thus, even in the case of pro-immigrant groups, human rights are but one possible rhetorical weapon in a struggle to defend their interests. NGOs see in human rights a minimalist ideology, a toned-down alternative to their preexisting Marxist or confessional discourse likely to draw more members. Yet migrant organizations offer a different picture. They prefer to base their claims on arguments other than human rights such as their contribution to the host society and versions of the American "no taxation without representation" slogan.¹³⁴ They draw on existing national public philosophies to legitimize their demands¹³⁵ or to constrain the normative range of solutions available to

¹³⁰ This procedure is spelt out in article K9 of the Treaty on European Union. Ratification by member-states must follow.

¹³¹ Clapham 1991, 17.

¹³² Geddes 1995; Ireland 1995; Amiraux 1997; Favell 1997b; Kastoryano 1994, 1996, 1997.

¹³³ On supranational political opportunity structures, see Tarrow 1995.

¹³⁴ Interview with Turgut Çakmakoglu, President, Türkische Gemeinde, Berlin, 1995.

¹³⁵ See Campbell 1995 for a model of the role of ideas in political change.

policymakers. In Riva Kastoryano's words, migrant groups "adapt to the rules of the game established by the nation-states, use the same tools as public authorities as they negotiate for their collective interests."¹³⁶ Therefore, national traditions rather than international norms are predominantly referred to when they frame their demands.

In brief, there are elements missing for the success of a "principled-issue network" focused on migrant rights in Europe. There is yet to be an adequation between the use of a human rights discourse and European-level mobilization. Moreover, there are not enough links between pro-migrant EU institutions and migrant-led nation-based movements. Part of this might be a question of resources on the part of migrants and their perception of the nation-state as chiefly responsible for their status and of their EU allies as institutionally weak.

I now turn to other possible foreign influences that are sometimes mentioned in the immigration literature that could contribute to the constitution of a principled issue network around migrant rights. The first one concerns neighbouring or allied countries who could serve as models for policy change. Their influence could lead to a "snowballing" effect¹³⁷ so that, rather than applying a European-level solution, countries would influence one another as in domino theory. For instance, Catherine de Wenden has pointing out that it was the Consultative Commissions for Immigrants (CCIs) set up in Belgium - especially after 1972- that served as models for other countries in the 1970s.¹³⁸ There seems to be international "fads" i. e. the spreading of certain policy gimmicks and imitation of programs which have been successful in one country. The case has also been made that the 1983 reform to grant local voting rights to resident aliens in the Netherlands imitated similar experiments in Scandinavia (Sweden granted aliens local voting rights in 1975). This may be true in part although the first parliamentary debates on voting rights for non-nationals took place in 1972 at a time when the voting rights of Dutch nationals living abroad were being challenged. Even if it were true, this does not answer the following query: why and how did the Netherlands grant voting rights when other countries such as France and Germany did not?

The question of imitation effects is often raised in political debates when the country in question is an outlier, a really late comer so that geographical isolation is in fact a sign of historical backwardness. This was the case in 1981 when the 1939 *décret-loi* regulating aliens' freedom of association was finally

¹³⁶ Kastoryano 1994, 172. See also Kastoryano 1996.

¹³⁷ Huntington 1991.

¹³⁸ de Wenden 1988.

overturned so as to lift restrictions on its exercise. During the parliamentary debate, the Socialist Véronique Neiertz underlined that "the French legislation is in fact clearly behind that of most European countries and, in particular, EEC countries, countries like Holland, Sweden (sic) and Denmark who grant freedom of association without restrictions."¹³⁹ The same argument was reproduced in Germany during the debate on citizenship: reforms in Belgium and the Netherlands were quoted in the draft bills of the social democrats, and reformist MPs stated that Germany was out of step with other EC countries and would be isolated in the New Europe.¹⁴⁰

Yet, copy-cat laws can be restrictive as well as liberalizing. The Netherlands recently developed an equal opportunity policy for aliens which was officially based on the Canadian model after the recommendations of the Dutch Scientific Council. At about the same time, over at the Ministry of Justice, plans were made to "plagiarize" Germany's reform of asylum law and the concept of "safe country of transit" and "safe country of origin" so as to make expulsions of asylum-seekers and illegals easier and the bill passed.¹⁴¹

Sending countries could also participate in a transnational issue network to protect migrant rights, so as to defend the interests of their nationals abroad. If this were the case, it could offer interesting instances where norms compete or contradict each other as the appropriate standards of behavior or principled beliefs need not be the same in the host and home country. The question is whether this pressure has a normative content and, if it does, whether these norms are principled beliefs that seek to foster the status of foreigners. In fact, countries of emigration do not necessarily lobby strongly to protect the status of their nationals. First, we find instances of sending countries which speak against measures aimed at consolidating the status of non-nationals because they consider them assimilationist and they threaten to undermine the foreigners' loyalty (and end money transfers) to their country of origin. A well-known example regards the King of Morocco's *mot d'ordre* forbidding his nationals to vote in Dutch local elections in 1986.¹⁴² Morocco also denounced the political activity and unionization of its migrants. With the help of French authorities, it imprisoned Moroccans who had been active in the French Communist trade

¹³⁹ Assemblée Nationale. 1981. *Deuxième Scéance du 29 Septembre 1981. Seconde Session. Septième Législature*. 1358.

¹⁴⁰ Murray 1994, 71-2.

¹⁴¹ Interview with, Gerard de Boer, Dutch Ministry of Justice, The Hague, 1995. The argument was that Germany's reform had a domino effect: the Netherlands would only accept to take foreigners expelled from Germany and who has transited through its territory if they could be passed on to the previous country of transit - Belgium in most cases.

¹⁴² Rath 1988.

union when they vacationed back home.¹⁴³ Similarly, Algeria spoke against freedom of association for foreigners during the 1981 reform, in large part because it did not want the monopoly and influence of its antenna in France (*L'Amicale des Algériens en Europe*) to be undermined by new associations.¹⁴⁴ Another attitude on the part of emigration countries besides negative meddling was indifference. For instance, Turkey did not want to get involved in matters affecting its nationals abroad until very recently after the 1993 deadly attack on Turks in Solingen.¹⁴⁵

A number of countries of emigration are ex-colonies and have very close ties with European countries. While this could give these countries a strong bargaining position vis à vis ex-colonial powers who wish to preserve their colonial realm of influence. Recent developments show that they do not use it to better the status of their nationals. Two recent cases demonstrate the ways in which ex-colonies play the "immigration card" in international negotiations without having the welfare of their nationals in mind. The first example regards Algeria and France. In the summer of 1994, the two countries signed a confidential agreement stipulating that Algeria would take back expelled illegal aliens whom the French believe to be Algerians even if the aliens have destroyed their papers.¹⁴⁶ The Algerian military government's reliance on France as an ally during the current civil war seems to have been more important than the treatment of its nationals. The second case involves Morocco and the EU. As the North African country sought to negotiate a favorable fishing agreement in 1995, it used the threat of further Moroccan immigration as a bargaining chip: "give us a deal, they threaten, or we will give you our people."¹⁴⁷ Whether for fish quotas or for political support, emigration countries are ready to cooperate with Europe on lowering the number of immigrants rather than lobby for the rights of the latter.

In summary, at the transnational level, one does not find a committed or effectual network of actors that promote international human rights and, in particular, the protection of aliens. This implies that international institutions such as the ECHR and the ECJ are fairly isolated at the supranational level in a way detrimental to their domestic influence.

¹⁴³ Benoît 1980, 284-6.

¹⁴⁴ Weil 1991, 144.

¹⁴⁵ For the Turkish government's declaration, see *International Herald Tribune*, 18 June 1993, 1. For ties between Turks abroad and the government, interview with Turgut Çakmakoglu, President, Türkische Gemeinde, Berlin, 1995.

¹⁴⁶ See Philippe Bernard, "Un accord confidentiel franco-algérien accroît la tension avec les étrangers reconduits à la frontière" in *Le Monde*, 18 October 1994.

¹⁴⁷ See "Morocco and the EU, more than fish" in *The Economist* 9-15 September 1995, 47-8.

Conclusion

My research findings suggest that (A) there is a limited legal basis on which international courts can apply human rights to protect non-nationals. (B) Even where the Convention provided such a basis, the European Court of Human Rights was reluctant to use its judicial capital in a politically explosive dossier. They did rule on certain very specific areas such as family life and protection against inhuman treatment. (C) Furthermore, the study of the rights of non-nationals shows that international organizations that seek to diffuse human rights norms have had little observable impact on national policies, especially if one compares the ways in which national high courts have entered the fray of immigration politics and imposed robust norms on the entry and stay of foreigners based on constitutional principles that went against the policy goals of governments after 1974. (D) The incorporation of European norms varies across cases (and time) depending on the national legal culture, namely the attitude of judges towards international law, and the activism of public interest law organizations. In any case, one cannot say that norms protecting aliens uniformly permeate domestic settings.

Notwithstanding, this study should encourage scholars to develop process-tracing research designs and working with precise definitions of norms and norms-adaptation mechanisms. It would be fruitful in particular to study the impact of international norms on other areas of the world, in particular new areas of migration such as Southern Europe, Japan, and the Middle East, and countries that are illiberal or have a weak judiciary. Organizational sociologists deem the diffusion of norms to be a global phenomenon and this would be a way to complement a study in countries that are “most likely cases.” The findings presented here suggest that, even in regions where the web of human rights institutions is dense, there is less pervasiveness of principled beliefs than what the sociology literature on global norms suggests.

International law-making is a slow yet unending process so the end of the story has yet to be written. The era of human rights standards-setting is perhaps over in Europe yet the jurisprudence of the ECHR and the ECJ may yet evolve. The present decade is marked by rights rerenchment rather than of rights granting and consolidation as were the 1970s and 1980s, in particular in the case of non-(EU)nationals. In this context, perhaps European courts along with their national counterparts may play an accrued role as guarantors of norms rather as as law-makers as Alec Stone has referred to European constitutional courts.¹⁴⁸

¹⁴⁸ Stone 1992.

Yet, one cannot overlook the fact that national governments that seek to enhance the effectiveness of their migration control policy have adapted to the important role of national courts and more minor influence of the ECJ and the ECHR. This can be seen by the way they have changed the level at which migration control is elaborated and implemented. New control policies include "remote control" strategies through the signing of cooperation agreements with transit and sending countries, and career liabilities that increases the number of potential migrants not allowed to land on European soil, the creation of international waiting zones where lawyers and associations have little access to migrants that may need to start legal proceedings. Similarly, European governments are devolving policy implementation responsibilities to local officials such as mayors in a way that goes against the idea of equal rights for aliens across a territory.¹⁴⁹ State responses to the juridicization of migration policy can also be seen in the lack of judicial review in the framework of the "third pillar on Justice and Home Affairs" that addresses common immigration and asylum issues. At the same time, intergovernmental frameworks of cooperation such as Schengen, Trevi and Dublin have fostered the creation of networks of civil servants and police officials whose dealings are secretive and are not the object of judicial, or legislative oversight.¹⁵⁰ In brief, there are a number of hindrances to the emergence of a strong international regime protecting the rights of non-nationals and it also faces the challenge of adaptive nation-states as it develops.

¹⁴⁹ On these two last points, see Guiraudon and Lahav 1997, and Guiraudon 1998b.

¹⁵⁰ Hix and Niessen 1996. Bigo 1996.

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